APR 14 1953
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~705~~ 36

IN THE MATTER OF THE FLORIDA EAST COAST RAILWAY CO.,
Debtor,

J. BRYSON AIRD and BANK OF THE MANHATTAN COMPANY,
Successor Mortgage Trustees,
Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD CO.,
Respondent.

MEMORANDUM OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD W. BOURNE
ANDREW OLIVER
WILLIAM A. BOYLAN
120 Broadway
New York 5, N. Y.

CHARLES COOK HOWELL
RICHARD B. GWATHMEY
Wilmington, North Carolina

CHARLES COOK HOWELL, JR.
Atlantic National Bank Bldg.
Jacksonville, Florida

Attorneys for Atlantic Coast Line Railroad Company, Respondent.

April 13, 1953

Bowne & Co., Inc., 163 Front Street, New York 38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 705

IN THE MATTER OF THE FLORIDA EAST COAST RAILWAY CO.,

Debtor,

J. BRYSON AIRD and BANK OF THE MANHATTAN COMPANY, Successor Mortgage Trustees,

Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD CO.,

Respondent.

MEMORANDUM OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition relates to the order of the Court of Appeals, Fifth Circuit, to which Nos. 670 and 702 relate.

The object of the petition does not appear to be to secure a separate writ of certiorari but rather (p. 5) "to draw to this Court's attention, by the filing of this petition, [the petitioners'] support of the several petitions filed or to be filed by bondholders' groups praying for a review of the ruling of the Court of Appeals". In other words, the Successor Mortgage Trustees have recorded their support of the petition in No. 670 and their support of any petitions which might be filed by the Lynch Interests or by the Welbon (Claughton) Group (see respondent's brief in No. 670, Appendix B, p. ix-xiii).*

* The Mortgage Trustees' petition is dated April 6, 1953 and was filed April 9. A petition of the Lynch Interests, No. 702, is dated and was filed April 8, 1953. A petition of the Welbon (Claughton) Group, No. 710, was filed on April 10, 1953.

BLURRED COPY

Since the petition is apparently designed merely to lend support to other petitions, in this memorandum we will limit ourselves to a brief discussion of the significance of the petition in relation to other petitions.

The Principal Significance of the Petition.

The most significant thing about the petition is the absence of any claim that the Successor Mortgage Trustees are authorized to speak for any of the bondholders who are otherwise unrepresented. As pointed out in the respondent's brief in No. 670, Judge STRUM and the petitioners in No. 670 treated the Successor Mortgage Trustees precisely as if they held beneficially all of the Bonds which are not held by bondholders who appeared before Judge STRUM (p. 10-12; Appendix B). We showed that there was no warrant for this under the terms of the First and Refunding Mortgage or the provisions of Section 77.

The Mortgage Trustees say (p. 4) that "Holders of approximately 70% of the bonds actively appeared before Judge STRUM in the District Court opposing this forced merger plan". They do not assert that they were authorized to bind or speak for the 29% who were counted by Judge STRUM and the petitioners in No. 670 to reach 99%.

The Assertions in the Petition: The Position of the Successor Mortgage Trustees.

In the petition the attorneys for the petitioners attempt to testify on behalf of the petitioners.

Neither J. Bryson Aird, who is individually a Trustee and is the Vice President in charge of the Trust Department of Bank of the Manhattan Company (Record, Vol. V, p. 375), nor any other officer or other representative of Bank of the Manhattan Company, has ever testified about the Commission's Plan. When the Previous Plan, which the Commission approved in 1948, came on before Judge

BLURRED

BLEED THROUGH

SIBLEY in 1949, Aird did testify (Record, Vol. V, p. 375-380). However, when the objections to the present Plan came on before Judge STRUM, neither Aird nor anyone else testified for the Successor Mortgage Trustees.

True, the Successor Mortgage Trustees, acting in concert with the duPont Trustees, the St. Joe Paper Company and the three little groups of bondholders who have filed petitions for certiorari, supported the program for a dismissal of the Section 77 proceeding and agreed to support the indefensible alternative equity plan (see respondent's brief in No. 670, p. 20-23). But no representative of the Successor Mortgage Trustees or of any of the others who sponsored the program for a dismissal, and who agreed on the alternative equity plan, took the witness stand before Judge STRUM to explain why they opposed the Commission's Plan and why they favored the alternative equity plan. Consequently there was no opportunity for counsel for the Atlantic Coast Line Railroad Company to cross-examine on those subjects.

As we have pointed out in our brief in No. 670 (p. 53-57), the record before Judge STRUM contained an overwhelming showing that the Commission's Plan was fair, if not generous; that it provided far more for the holders of the First and Refunding Mortgage Bonds as a class than the alternative equity plan; and that it provided more than the alternative equity plan even for those who would be the beneficiaries of the unequal treatment provided for in that plan. In Judge STRUM's opinion there was no *comparison* between what the bondholders will receive under the Commission's Plan with what they would receive under the alternative equity plan or any other plan. After considering the briefs and the argument in the Court of Appeals the majority of that Court expressed themselves without reservation as satisfied that the Commission's Plan is fair, if not generous, and that the desire for control is the explanation of the opposition to the Plan (Record,

ED COPY

Vol. II, p. 728; 201 F. 2d 329-330). The minority of the Court of Appeals did not dissent on those points.

The petitioners make no effort to show that the Court of Appeals was wrong. Instead, the petitioners' attorneys aver that the "petitioners are convinced that the plan of forced merger of the debtor with the Atlantic Coast Line Railroad is grossly unfair and inequitable to the bondholders as a class" (p. 4). They further aver that the position taken in the petition is the "petitioner's own independent conclusion" and that it is "not based (as Atlantic Coast Line counsel have insinuated) upon a policy of blind subservience to the wishes of a majority of the bonds" (p. 5). Thus the petitioners' attorneys attempt to testify now about the Mortgage Trustees' convictions and their independence, although Aird failed to take the stand and subject himself to cross-examination on either subject. Furthermore, the attorneys' attempted testimony is couched in limitlessly elastic words—"grossly unfair and inequitable", as used by the petitioners, could mean almost anything.

The petitioners' attorneys deny that the Successor Mortgage Trustees have followed "a policy of blind subservience to the wishes of a majority of the bonds" (p. 5). Aird testified as a witness at the hearing before Judge Sibley as follows (Record, Vol. V, p. 379):

> "Furthermore, the Trustees' positions, naturally, would be—the Trustee is ordinarily persuaded, and should be, by a large majority of its bondholders."

The significance of this testimony is not obscured by references to "blind subservience" or suggestions that counsel who quoted the testimony have made insinuations. Certainly the Successor Mortgage Trustees' willingness to endorse *in advance* other petitions for certiorari "to be filed" indicates "subservience", whether blind or not.

The petitioners' attorneys further testify as follows (p. 5):

BLURRED

BLEED THROUGH

> "Your petitioners have, however, no problem of weighing the position of the majority against that of the minority—there is no minority of bondholders —nor to your petitioners' knowledge even a single bondholder—now actively supporting the plan."

There is no competent evidence as to who is in favor or against the Plan except that summarized in the respondent's brief in No. 670 at pages 10-12.* There is no competent evidence at all about the "petitioners' knowledge" with respect to support of the Plan, since no one has ever testified on behalf of the petitioners about the Plan. There has been no opportunity to find out what the Successor Mortgage Trustees have told bondholders when they inquired about the Plan. And the words "actively supporting" are as elastic as the words "grossly unfair and inequitable" seem to be in this case.

CONCLUSION.

The petition should be denied.

Dated, April 13, 1953

EDWARD W. BOURNE
ANDREW OLIVER
WILLIAM A. BOYLAN
120 Broadway
New York 5, N. Y.

CHARLES COOK HOWELL
RICHARD B. GWATHMEY
Wilmington, North Carolina

CHARLES COOK HOWELL, JR.
Atlantic National Bank Bldg.
Jacksonville, Florida

Attorneys for Atlantic Coast Line Railroad Company, Respondent.

---

* We do not concede that it would make any difference whether there are, or are not, any bondholders "now actively supporting the plan".

D COPY